

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

GUY DREXEL	: CIVIL ACTION
	:
v.	:
	:
DONALD T. VAUGHN, et al.	: NO. 96-3918

MEMORANDUM and ORDER

Norma L. Shapiro, J.

April 2, 1998

Plaintiff Guy Drexel ("Drexel"), alleging unlawful retaliation under 42 U.S.C. § 1983, has filed the present action against defendants Donald T. Vaughn ("Super. Vaughn"), Superintendent of the State Correctional Institute at Graterford ("SCI-Graterford"), William R. Winder ("Dep. Super. Winder"), former Deputy Superintendent of Facilities Management at SCI-Graterford, SCI-Graterford Corrections Officers Captain Robert Terra ("Capt. Terra"), Captain Creighton Caison ("Capt. Caison"), former Lieutenant Michael Barone ("Lt. Barone") and Lieutenant Kevin Marsh ("Lt. Marsh"), Inmate Prison Manager and Program Review Committee ("PRC") member Adrian Callender ("Callender") and prison psychologist and PRC member Russell Smith ("Dr. Smith"). All defendants have moved for summary judgment. For the reasons stated below, defendants' motion will be granted in part and denied in part.

BACKGROUND

Drexel was convicted in 1980 for first degree murder and receipt of stolen goods. He was sentenced to three to seven

years on the latter charge, and life imprisonment for the former. (Sentence Status Summary, attached as Ex. 2-A to Defs.' Brief ["Sentence Status Summary"]). From March, 1980 until August, 1995, Drexel was incarcerated at SCI-Graterford.

At SCI-Graterford, Drexel became a member of a painting crew. Drexel frequently worked a late-night shift from 8:00 p.m. until 3:00 a.m.; Drexel generally worked without direct supervision from corrections staff. The painting job offered Drexel access to the kitchen and a "paint room" for storing painting supplies. (Dep. of Guy Drexel at 13-18, attached as Ex. 4 to Defs.' Brief ["Drexel Dep."]). Drexel was supervised during the day by Corrections Officer James Salvi ("CO Salvi").

Drexel was given "access to maintenance to get whatever tools I wanted whenever I wanted them. And I would just go down there and get stuff and they'd mark it in a book and I'd sign this book." (Id. at 91). Dep. Super. Winder and CO Salvi protected Drexel. "If I got a write-up or got jammed up with somebody, I could call Winder and depend on him to help me out." (Id. at 82). Some corrections officers reported Winder instructed them to drop misconduct reports. Some officers stopped citing Drexel for infractions because of this. (Id. at 98-99).

During his fifteen years at SCI-Graterford, Drexel was found guilty of twenty misconducts, eleven of which were for possession

of contraband. (Conduct Record, attached as Ex. 2-C to Defs.' Brief ["Conduct Record"]).

On November 13, 1992, officers observed Drexel returning with the paint cart from the kitchen to the "paint room." The officers searched the cart and discovered four ten-pound, frozen hams. Drexel was charged with possession of contraband. (Misconduct Report No. 463870, attached as Ex. 1 to Drexel Dep.). Drexel told CO Salvi that Lieutenant Thompson gave him the hams. (Drexel Dep. at 12-13). The charge was reduced and Drexel was punished with five days lost work.

On October 4, 1993, officers searched Drexel's cell and the "paint room." The officers found a variety of items, including a syringe, ball peen hammer, pair of pliers, file, length of metal chain, nine metal scrapers and a set of five prison keys.¹ (Misconduct Report No. 469065 & Confiscation Receipt, attached as Ex. 3-A to Defs.' Brief). Drexel was charged with possession of contraband; he pled guilty to possession of contraband and was sentenced to fifteen days disciplinary custody, although Drexel

¹ Other contraband discovered in Drexel's cell and his "paint room" included: an electric hand dryer; a wire brush; a metal punch; a glass bottle of after-shave lotion; 19 mouse traps; 2 boxes of "top"; a container of Red Hot ointment; a glass mirror; 3 can openers; ½ gallon of orange juice; 1 pound of vegetable oil; 15 pounds of sugar; 40 pounds of sliced cheese; 6 quarts of tomato juice; over 120 pounds of spaghetti sauce; 18 cans of tomatoes; 160 pounds of spaghetti; a can of grapefruit juice; 6 cans of chow mein noodles; 7 gallons of salad dressing; 1,440 eggs; and a quart of powdered garlic.

claims the sanction was just "on paper." (Drexel Dep. at 88).

On September 2, 1994, a corrections officer noticed Drexel carrying a large trash bag through the prison. The officer searched the bag and discovered twelve cans of grapefruit juice. The officer confiscated the juice and cited Drexel for possession of contraband. (Misconduct Report No. 454453, attached to Drexel Dep. as Ex. 8). Drexel pled guilty to the charge; he was not sanctioned.

On September 22, 1994, officers discovered that one of the prison keys recovered from Drexel's cell opened the door to the prison butcher shop. (Ismael Soler Decl. ¶ 11, attached as Ex. 3 to Defs.' Brief ["Soler Decl."]). Drexel's access to the butcher shop facilitated his acquisition of food products.

On September 23, 1994, officers searching Drexel's cell discovered, among other things, nine additional prison keys, a screwdriver, glass cutter and one hundred pairs of new, government-issued underpants.² (Misconduct Report No. 610220, attached as Ex. 11 to Drexel Dep.). Drexel was charged with possession of contraband; he was found guilty and sentenced to ten days disciplinary custody in his cell.

On October 12, 1994, officers searched Drexel's "paint room"

² Additional contraband discovered in Drexel's cell included: a Sanyo radio; 2 bags of coffee; ½ bag of Rice Krispies; a bottle of aspirin; a can of aerosol foot spray; 14 onions; a bag of hot peppers; several bananas; 4 pounds of canned tuna; and numerous trash bags.

and found more contraband, including a quart of gasoline, bottle of ammonia, pliers, vice grips, scrapers, flashlight, hammer, wrench, extension cord, can of WD-40, thirty-four feet of rope, belt sander, emergency light with batteries, screwdrivers, razor blades and four lockpicks.³ (Ex. 12 to Drexel Dep.).

Sometime in late February or early March, 1995, Drexel claims CO Salvi told him of an impending SCI-Graterford investigation by state and federal law enforcement authorities. (Drexel Dep. at 149-51). Drexel alleges CO Salvi warned Drexel to keep a low profile for the next few months because of the investigation.

On April 19, 1995, Sergeant Lucille Boston ("Sgt. Boston"), assigned to SCI-Graterford's kitchen area, learned that officers had discovered several tools belonging to outside contractor Barry Miller ("Miller") on Drexel's paint cart. Sgt. Boston, charging Drexel with possession of contraband, filed Misconduct Report No. 622809. (Misconduct Report No. 622809, attached as Ex. B to Compl.)⁴.

That same day, Corrections Officer Pajil ("CO Pajil") notified Lt. Barone that Miller had informed him they discovered

³ Officers also found 2 drill bits, an antenna, a hasp, 2 coat hooks, a box of sheet metal screws, a tube of sealant, 10 loom needles, 2 bottles of garlic powder and a bible.

⁴ All references to the Complaint refer to the Amended Complaint filed on February 14, 1997.

several missing items⁵ and a lockpick in a painter's box used by Drexel. Miller also reported that Drexel was storing in the painter's box a five gallon bucket of raw eggs, pair of rubber boots, pair of headphones and three cases of trash bags. (CO Pajil Memo, attached as Ex 3-G to Defs.' Brief ["CO Pajil Memo"])).

Lt. Barone, alleging Drexel was a security risk to staff and fellow inmates, filed Misconduct Report No. 465261 and placed Drexel in administrative segregation. Capt. Terra approved the report. Drexel was transferred to a restricted housing unit ("RHU"). (Misconduct Report No. 465261, attached as Ex. 3-H to Defs.' Brief).

On April 20, 1995, Department of Corrections ("DOC") Hearing Examiner J. Kevin Kane ("Examiner Kane") dismissed Misconduct Report No. 622809 filed by Sgt. Boston without prejudice and without further comment. (Disciplinary Hearing Report, attached as Ex. C to Compl.). No disciplinary action resulted from that misconduct, but Drexel remained in segregation as a result of the second misconduct report filed on April 19, 1995 by Lt. Barone.

Drexel met with the Program Review Committee ("PRC") on April 26, 1995. The PRC consisted of Dr. Smith, Callender and Lt. Marsh. The PRC, reporting that the reasons for Drexel's

⁵ The items included: pliers; channel locks; screwdrivers; razor blades; duct tape; silicone caulk; a can of "lockfree"; and a can of WD-40.

placement in the RHU were "not readily apparent," asked the security department to state its rationale for placing Drexel in segregation. (PRC Action dated 4/26/95, attached as Ex. D to Compl.). Meanwhile, Drexel was retained in segregation.

Drexel met with the PRC again on May 24, 1995 for a thirty-day review of his segregation status. The PRC members were Dr. Smith, Callender and Capt. Caison. The PRC had been told that Drexel hoarded tools and food and there might be a transfer petition submitted to DOC's central office because of Drexel's potential security risk. (Dep. of Capt. Caison at 81-82, attached as Ex. 8 to Defs.' Brief ["Caison Dep."]). The PRC found Drexel: "reportedly was hoarding tools. He denies this. Security office believes he should be transferred. Counselor indicates that a transfer petition will be submitted. Petition should be sent to DOC as soon as possible." (PRC Action dated May 24, 1995, attached as Ex. E to Compl.). The PRC directed that Drexel remain in segregation for an additional thirty days.

On June 15, 1995,⁶ Drexel asked Lieutenant Ismael Soler ("Lt. Soler") to tell Thomas D. Stachelek ("Dep. Super. Stachelek"), Deputy Superintendent for Centralized Services at SCI-Graterford, he wanted to talk to him about Dep. Super.

⁶ Drexel's Complaint states the meeting occurred on July 15, 1995, (Compl. ¶ 22), but his brief in opposition to summary judgment states the meeting took place on June 15, 1995, as defendants aver. See Pltff.'s Brief at 8.

Winder. Lt. Soler and Dep. Super. Stachelek met with Drexel for about one hour that day. (Decl. of Thomas Stachelek ¶¶ 3-4, attached as Ex. 9 to Defs.' Brief ["Stachelek Decl."]).

Drexel informed them that Dep. Super. Winder had ordered corrections officers to drop misconduct reports concerning Drexel. He also told them Capt. Terra had provided food stolen by Drexel to a group of Italian inmates on E-Block. (Id. ¶ 7). Drexel denied selling inmates the tools found in his cell and "paint room"; Drexel admitted selling food to inmates in exchange for favors. (Drexel Dep. at 82).⁷ Drexel stated he was aware of his counselor's pending petition to transfer him from SCI-Graterford. (Stachelek Decl. ¶ 16).

Dep. Super. Stachelek prepared a written memorandum of the conversation and sent it to Super. Vaughn. Super. Vaughn reported the meeting to Raymond Clymer ("Dep. Comm'r Clymer"), DOC Deputy Commissioner for the Eastern Region of Pennsylvania. Dep. Comm'r Clymer stated he would forward the material to the DOC Office of Professional Responsibility and transfer Drexel to SCI-Camp Hill. (Stachelek Decl. ¶ 14).

Drexel had his next PRC thirty-day review on June 21, 1995. The PRC again consisted of Dr. Smith, Callender and Capt. Caison.

⁷ Drexel was "the Radar O'Reilly of Graterford. If you wanted something done maintenance-wise or you needed something like an air conditioner, they would call me and I'd get it done. Because I have all the hookups and I had the ultimate bribe in jail which is food." (Drexel Dep. at 82).

The PRC reported the transfer petition prepared by Drexel's counselor had been submitted and returned Drexel to segregation for thirty days. (PRC Action dated June 21, 1995, attached as Ex. F to Compl.).

Drexel had his final PRC review on August 16, 1995.⁸ The PRC informed Drexel his transfer to SCI-Greene had been approved.⁹ Drexel was returned to segregation pending transfer. (PRC Action dated August 16, 1995, attached as Ex. 17 to Drexel Dep.).

Drexel remained in segregation until his transfer to SCI-Greene on August 23, 1995. At SCI-Greene, Drexel was interviewed regarding his knowledge of activities in SCI-Graterford by a Pennsylvania State Police officer, a federal agent and Mike Dotson ("Dotson") of the DOC Internal Affairs Division. Drexel cooperated with them. (Compl. ¶¶ 29-30).

In October, 1995, numerous federal and state law enforcement agents and DOC personnel raided SCI-Graterford and conducted an extensive search for contraband. Drexel claims he testified before a federal grand jury investigating SCI-Graterford on February 14, 1996. In return for his cooperation, he was

⁸ The court has not been provided with records of a PRC review in July, 1995, although Drexel concedes he attended a PRC review in July, 1995 that was "essentially identical" to the June 21, 1995 PRC review. (Compl. ¶ 23).

⁹ It is not clear why Drexel was not transferred to SCI-Camp Hill, as Dep. Comm'r Clymer originally intended.

transferred to SCI-Mahanoy that day. (Sentence Status Summary).

Lt. Barone was suspended for three days and transferred to SCI-Houtzdale. (Dep. of Lt. Barone at 9-15, attached as Ex. 6 to Defs.' Brief ["Barone Dep."]). DOC terminated Capt. Caison; he was ordered reinstated after a civil service appeal but has since retired. (Caison Dep. at 20-28). Dep. Super. Winder, given the choice of retirement or termination, chose to retire. (Winder Dep. at 13-26). Capt. Terra was transferred to SCI-Frackville and subsequently terminated, but the disciplinary action was reduced to suspension and reinstatement after a civil service appeal. Capt. Terra is currently working at SCI-Frackville. (Dep. of Capt. Terra at 10-16, attached as Ex. 7 to Defs' Brief ["Terra Dep."]).

During a search of Drexel's cell at SCI-Mahanoy on March 10, 1997, officers found three boxes and five grocery bags of commissary items. Drexel was cited for possessing contraband totaling \$149.09. (Misconduct Report No. 731617, attached as Ex. 14 to Drexel Dep.). Drexel admitted he was running an "inmate store." (Drexel Dep. at 239).¹⁰ Examiner Kane found Drexel guilty of possessing contraband; confiscation of the goods was the only sanction.

¹⁰ Drexel explained the operation of his "inmate store" as follows: inmates would "borrow" an item, such as a bag of chips, and pay back Drexel a week later with two bags of chips. (Drexel Dep. at 239-40). Once Drexel's pantry obtained a minimal amount of supplies, the operation became self-sufficient.

By Memorandum and Order dated June 20, 1997, the court dismissed Drexel's § 1983 claim against the prison officials in their official capacities, due process claim for loss of his personal property during his prison transfer, Fifth Amendment double jeopardy and self-incrimination claims, Eighth Amendment claim and related state law claims. See Drexel v. Horn, No. 96-3918, 1997 WL 356484 (E.D. Pa. June 20, 1997). Defendants seek summary judgment on Drexel's remaining § 1983 retaliation claim.

DISCUSSION

I. Standard of Review

Summary judgment may be granted only "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). A defendant moving for summary judgment bears the initial burden of demonstrating there are no facts supporting the plaintiff's claim; then the plaintiff must introduce specific, affirmative evidence there is a genuine issue for trial. See Celotex Corp. v. Catrett, 477 U.S. 317, 322-324 (1986). "When a motion for summary judgment is made and supported as provided in [Rule 56], an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided

in [Rule 56], must set forth specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e).

The court must draw all justifiable inferences in the non-movant's favor. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986). A genuine issue of material fact exists only when "the evidence is such that a reasonable jury could return a verdict for the non-moving party." Id. at 248. The non-movant must present sufficient evidence to establish each element of its case for which it will bear the burden at trial. See Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 585-86 (1986).

II. Respondeat Superior Liability

Section 1983 liability cannot be based on respondeat superior; the plaintiff must have proof the supervising official had personal involvement in the challenged decisions. See Hampton v. Holmesburg Prison Officials, 546 F.2d 1077, 1082 (3d Cir. 1976). "Personal involvement can be shown through allegations of personal direction or of actual knowledge and acquiescence. Allegations of participation or actual knowledge and acquiescence, however, must be made with appropriate particularity." Rode v. Dellarciprete, 845 F.2d 1195, 1207 (3d Cir. 1988).

A. Superintendent Vaughn

Super. Vaughn cannot be liable under § 1983 merely because

he was the superintendent of SCI-Graterford. Drexel claims Super. Vaughn was directly involved in his segregation because Drexel repeatedly appealed his confinement to Super. Vaughn, who did not act on his appeals. (Drexel Dep. at 205-14). Super. Vaughn also signed each of the PRC reports directing Drexel's segregation. Super. Vaughn also recommended Drexel's transfer to Dep. Comm'r Clymer. Drexel has alleged sufficient personal involvement of Super. Vaughn to withstand summary judgment.

B. Deputy Superintendent Winder

Drexel claims Dep. Super. Winder protected Drexel from reprisals until April, 1995, when Dep. Super. Winder did not intercede to prevent Drexel's segregation. Drexel has theorized that Dep. Super. Winder was afraid of Drexel's knowledge and wanted to silence him, (Drexel Dep. at 247-49), but there is no evidence Dep. Super. Winder was directly or indirectly involved in Drexel's placement in the RHU or his transfer to SCI-Greene.

Drexel cannot maintain a claim against Winder based on unsupported speculation and conclusory allegations. See Medina-Munoz v. R.J. Reynolds Tobacco, 896 F.2d 5, 8 (1st Cir. 1990); Barnes Foundation v. Township of Lower Merion, 982 F. Supp. 970, 982 (E.D. Pa. 1997). Summary judgment is appropriate when the plaintiff has produced nothing more than a "scintilla" of evidence of a defendant's involvement. See Anderson, 477 U.S. at 249-50, 252. Summary judgment will be granted in favor of

Dep. Super. Winder on both the retaliatory segregation and transfer claims.

III. Retaliation Under § 1983

Drexel claims he was placed in administrative segregation and ultimately transferred from SCI-Graterford because he participated in a state and federal investigation of the prison. There is no constitutional right to remain in the general prison population. See Sandin v. Connor, 515 U.S. 472, 485-86 (1995). There also is no constitutional right to avoid transfer from one prison facility to another. See Olim v. Wakinekona, 461 U.S. 238, 247 (1983). But Drexel argues his placement in the RHU and transfer from SCI-Graterford, while constitutionally permissible, were in retaliation for Drexel's engaging in a constitutionally protected activity.

"Retaliation for the exercise of constitutionally protected rights is itself a violation of rights secured by the Constitution actionable under section 1983."¹¹ White v.

¹¹ 42 U.S.C. § 1983 provides:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress....

Napolean, 897 F.2d 103, 111 (3d Cir. 1990). "[A]n act in retaliation for the exercise of a constitutional right is actionable under [s]ection 1983 even if the act, when taken for different reasons, would have been proper.'" Franco v. Kelly, 854 F.2d 584, 590 (2d Cir. 1988) (quoting Howland v. Kilquist, 833 F.2d 639, 644 (7th Cir.1987)); see Woods v. Smith, 60 F.3d 1161, 1165 (5th Cir. 1995), cert. denied, 516 U.S. 1084 (1996); Smith v. Maschner, 899 F.2d 940, 948 (10th Cir. 1990); Sprouse v. Babcock, 870 F.2d 450, 452 (8th Cir. 1989); Simpson v. Smith, No. 90-7089, 1991 WL 24795, at *2 (E.D. Pa. Feb. 21, 1991).

Prison officials could lawfully place Drexel in segregation or transfer him without infringing an interest protected by the Due Process Clause, but they could not do so to punish Drexel for engaging in constitutionally protected activity.

"[A]n otherwise legitimate and constitutional government act can become unconstitutional when an individual demonstrates that it was undertaken in retaliation for his exercise of First Amendment speech." Anderson v. Davilla, 125 F.3d 148, 161 (3d Cir. 1997); see Milhouse v. Carlson, 652 F.2d 371, 373-74 (3d Cir. 1981). "[O]rdinary citizens enjoy a constitutional privilege to freely participate in governmental investigations." Cornell v. Woods, 69 F.3d 1383, 1388 (8th Cir. 1995).

"[L]awful incarceration brings about the necessary withdrawal or limitation of many privileges and rights, a retraction

justified by the considerations underlying our penal system.'" Jones v. North Carolina Prisoners' Labor Union, Inc., 433 U.S. 119, 125 (1977) (quoting Price v. Johnston, 334 U.S. 266, 285 (1948)). But "a prison inmate retains those First Amendment rights that are not inconsistent with his status as a prisoner or with the legitimate penological objectives of the corrections system." Pell v. Procunier, 417 U.S. 817, 822 (1974); see Cruz v. Beto, 405 U.S. 319, 321-22 (1972) (per curiam).

Drexel participated in a state and federal investigation of corrupt practices at SCI-Graterford. "Drexel's activity regarding prison corruption, a matter of grave public concern, implicated rights under the First Amendment." Drexel, 1997 WL 356484, at *6. Placing an inmate in administrative segregation as retaliation for engaging in constitutionally protected activity violates § 1983. See Anderson v. Horn, No. 95-6582, 1997 WL 152801, at *3 (E.D. Pa. Mar. 28, 1997). A retaliatory transfer to another prison facility is also actionable. See Rizzo v. Dawson, 778 F.2d 527, 531 (9th Cir. 1985); Majid v. Henderson, 533 F. Supp. 1257, 1270 (N.D.N.Y.), aff'd 714 F.2d 115 (2d Cir. 1982). Accepting Drexel's allegations as true, he was engaged in a constitutionally protected activity.

IV. Substantial & Motivating Factor

Drexel must also prove that a retaliatory motive was a "substantial" or "motivating" factor in defendants' decision to

place him in segregation and transfer him to SCI-Greene. See Mt. Healthy City Sch. Dist. v. Doyle, 429 U.S. 274, 287 (1977); Squires v. Bonser, 54 F.3d 168, 175 n.11 (3d Cir. 1995). The burden then shifts to defendants to show, by a preponderance of the evidence, that they would have taken the same action absent their invidious motive. See Mt. Healthy, 429 U.S. at 287; Bradley v. Pittsburgh Bd. of Ed., 913 F.2d 1064, 1074 (3d Cir. 1990); see also Village of Arlington Heights v. Metropolitan Housing Dev. Corp., 429 U.S. 252, 271 n.21 (1977); Palmer v. Thompson, 403 U.S. 217, 224-26 (1971).

A. Segregation

The officials directly involved in Drexel's RHU confinement were: Lt. Barone and Capt. Terra, who originally issued and approved the misconduct report requiring segregation; Dr. Smith, Callender, Lt. Marsh and Capt. Caison, the members of the PRC who repeatedly approved Drexel's continued segregation in the RHU; and Super. Vaughn, who signed the PRC Actions returning Drexel to the RHU.

For each of these officials to be liable under § 1983 for segregating Drexel in retaliation for his participation in an outside investigation, the official must have had knowledge of his participation in that investigation; if he had no knowledge of the investigation, retaliation for Drexel's participation in the investigation cannot have been a "substantial" or

"motivating" factor in deciding to place Drexel in segregation.

Drexel stated he received a tip from CO Salvi that an investigation was pending in late February or early March, 1995. (Drexel Dep. at 79-80). But Drexel first informed prison officials of corruption during his June 15, 1995 meeting with Dep. Super. Stachelek and Lt. Soler; Drexel admits he did not meet with outside officers to discuss participating in their investigation until after his transfer to SCI-Greene in August, 1995. (Compl. ¶¶ 22, 27, 29-31). Drexel has not introduced any other evidence of personal involvement with a prison corruption probe prior to his June 15, 1995 meeting with two SCI-Graterford officials.

There is no evidence defendants retaliated against Drexel for his involvement in an outside investigation before he began to participate in that investigation. Drexel argues defendants may have segregated him because of fear that he might cooperate in an outside investigation at some time in the future. If so, defendants were still not retaliating against Drexel for engaging in a constitutionally protected right he was not yet engaged in, so there is no § 1983 remedy. See Anderson, 125 F.3d at 161; White, 897 F.2d at 111; Milhouse, 652 F.2d at 373-74.

If Drexel's statements to Dep. Super. Stachelek and Lt. Soler in June, 1995 began his participation in the SCI-Graterford investigation, his continued confinement in segregation from then

until his transfer in August, 1995 may have been in retaliation. The only defendants involved in Drexel's continued confinement were Dr. Smith, Callender and Capt. Caison, the members of the PRC who returned Drexel to segregation in June and July, 1995, and Super. Vaughn, who signed the PRC Actions returning Drexel to the RHU. Those defendants must have had knowledge of Drexel's role in the investigation to be liable under § 1983. See Mt. Healthy, 429 U.S. at 287; Squires, 54 F.3d at 175 n.11.

Capt. Caison's testimony that he had no knowledge of an investigation or Drexel's role during the time of Drexel's segregation is uncontradicted. (Caison Dep. at 25-26, 108-09, 111, 113). Drexel has presented no evidence Dr. Smith or Callender had knowledge of an outside investigation or his participation when they conducted PRC reviews and returned Drexel to the RHU in June or July, 1995. Summary judgment is appropriate when the plaintiff has produced no evidence of a defendant's motive other than speculation. See Anderson, 477 U.S. at 249-50, 252; Keller v. Bluemle, 571 F. Supp. 364, 371 (E.D. Pa. 1983), aff'd, 735 F.2d 1349 (3d Cir. 1984); see also Advo, Inc. v. Philadelphia Newspapers, Inc., 51 F.3d 1191, 1197 (3d Cir. 1995). There is no evidence these defendants had knowledge of Drexel's role in any pending investigation; they would not have been retaliating against Drexel when they continued his segregation in June or July, 1995. Summary

judgment will be entered in favor of these defendants on the retaliatory segregation claim.

Super. Vaughn had a direct role in Drexel's return to the RHU in June and July, 1995, because he signed the PRC Actions that retained Drexel in segregation. Dep. Super. Stachelek informed Super. Vaughn of Drexel's allegations during the June 15, 1995 meeting among Drexel, Dep. Super. Stachelek and Lt. Soler. Therefore, Super. Vaughn was aware of Drexel's allegations of corruption at the time he signed the PRC Actions returning Drexel to the RHU in June and July, 1995. Drexel has evidence of knowledge and personal involvement on the part of Super. Vaughn sufficient for a prima facie case against Super. Vaughn for retaliatory segregation from June until his transfer in August, 1995. Whether Drexel's complaints of corruption were a "substantial" or "motivating" factor in Super. Vaughn's decision to approve the PRC actions returning Drexel to segregation for those months is a question of fact.

The testimony by Lt. Barone and Capt. Terra that they had no knowledge of the outside investigation or Drexel's cooperation during the time Drexel was in the RHU is uncontradicted. (Barone Dep. at 81-82, 99; Terra Dep. 21-23, 67-68, 74). Capt. Terra and Lt. Barone had no involvement in Drexel's segregation after he reported corruption or knowledge of an investigation or Drexel's participation in an investigation; their role in Drexel's

placement in the RHU could not have been retaliatory under § 1983. Summary judgment will be granted in favor of these defendants on the retaliatory segregation claim.

Lt. Marsh's only involvement in Drexel's segregation was his filing of a disciplinary report in April, 1995. At that time, Drexel had not yet begun cooperating with officials investigating corruption at SCI-Graterford, so his action could not have been retaliatory. See Anderson, 125 F.3d at 161; White, 897 F.2d at 111; Milhouse, 652 F.2d at 373-74. Summary judgment will be entered in favor of Lt. Marsh on the retaliatory segregation claim.

B. Transfer

After Drexel's conversation with Dep. Super. Stachelek and Lt. Soler, Dep. Super. Stachelek informed Super. Vaughn of Drexel's allegations. Super. Vaughn recommended Drexel's transfer to Dep. Comm'r Clymer, who authorized Drexel's move. The PRC also may have had a role in facilitating Drexel's transfer. On the PRC Action for May 24, 1995, the committee stated: "[Drexel] reportedly was hoarding tools. He denies this. Security office believes that he should be transferred. Counselor indicates that a transfer petition will be submitted. Petition should be sent to DOC as soon as possible." (PRC Action dated 5/24/95).

The record does not show whether Super. Vaughn acted upon

this report or the memorandum submitted by Dep. Super. Stachelek when recommending Drexel's transfer to Dep. Comm'r Clymer. But the PRC Action occurred in May, 1995, several weeks before Drexel made his first allegations of corruption to Dep. Super. Stachelek and Lt. Soler on June 15, 1995. Because Drexel was not yet participating in an investigation, the PRC members were not recommending his transfer in retaliation for constitutionally protected activities. Summary judgment on the retaliatory transfer claim will be granted in favor of Dr. Smith, Callender and Capt. Caison.

Super. Vaughn recommended Drexel's transfer to SCI-Greene after learning of Drexel's allegations from Dep. Super. Stachelek. Therefore Super. Vaughn had a direct role in Drexel's transfer and knowledge of Drexel's allegations of corruption. Drexel has established a prima facie case of retaliatory transfer against Super. Vaughn. Whether Drexel's complaints of corruption were a "substantial" or "motivating" factor in Super. Vaughn's decision recommending Drexel's transfer is a question of fact.

There is no evidence any defendant other than Super. Vaughn and the May, 1995 PRC members were in any way involved in Drexel's transfer; summary judgment will be granted on the retaliatory transfer claim as to Capt. Terra, Lt. Barone and Lt. Marsh.

V. Vaughn's Other Motives

Once a plaintiff establishes that impermissible retaliation formed a "substantial" or "motivating" factor in defendants' actions, the burden shifts to the defendant to establish, by a preponderance of the evidence, that he would have taken the same action without the impermissible motive. See Mt. Healthy, 429 U.S. at 287; Bradley, 913 F.2d at 1074. Defendants argue "the indisputable facts of record establish that Drexel would have been placed and kept in administrative custody and transferred to another state correctional institution whether or not he participated in an investigation." Defs.' Brief at 24. According to defendants, Drexel posed a security risk to SCI-Graterford that justified his segregation and transfer.

The record is clear that Drexel repeatedly hoarded supplies in his cell and "paint room." But whether Super. Vaughn, apart from any retaliatory motive, would have stopped his conduct for security or other reasons at that particular time, after prison officials ignored his conduct for fifteen years, is a question of material fact not properly resolved on summary judgment.

VI. Qualified Immunity

Defendants argue they are entitled to qualified immunity for their decision to place Drexel in the RHU and transfer him to SCI-Greene. Government officials performing discretionary functions are "shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory

or constitutional rights of which a reasonable person would have known." Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982). The "inquiry is whether a reasonable officer could have believed that his or her conduct was lawful, in light of the clearly established law and the information in the officer's possession." Sharrar v. Felsing, 128 F.3d 810, 826 (3d Cir. 1997). Government officials who "reasonably but mistakenly" violate a plaintiff's constitutional rights are immune from liability. See Anderson v. Creighton, 483 U.S. 635, 641 (1987). "The qualified immunity standard 'gives ample room for mistaken judgments' by protecting 'all but the plainly incompetent or those who knowingly violate the law.'" Hunter v. Bryant, 502 U.S. 224, 229 (1991) (quoting Malley v. Briggs, 475 U.S. 335, 341, 343 (1986)).

Drexel has alleged defendants intentionally segregated and transferred him in retaliation for his participation in a state and federal investigation of corruption at SCI-Graterford. It is well established that prisoners retain First Amendment rights to participate in investigations and outside litigation. See, e.g., Pell, 417 U.S. at 822. The Court of Appeals has "'adopted a broad view of what constitutes an established right of which a reasonable person would have known.'" Stoneking v. Bradford Area Sch. Dist., 882 F.2d 720, 726 (3d Cir. 1989) (quoting Sourbeer v. Robinson, 791 F.2d 1094, 1103 (3d Cir. 1986), cert. denied, 483 U.S. 1032 (1987)), cert. denied, 493 U.S. 1044 (1990).

It is inconceivable that "officers of reasonable competence could disagree," Malley, 475 U.S. at 341, on whether it is unlawful to punish an inmate for constitutionally protected activity. It is well established that "truthfully answering questions concerning a misconduct investigation against a correctional officer is undoubtedly quite consistent with legitimate penological objectives," Cornell, 69 F.3d at 1388, and implicates an inmate's First Amendment right to petition the government for redress of grievances. See Sprouse, 870 F.2d at 452; Franco, 854 F.2d at 589; Sostre v. McGinnis, 442 F.2d 178, 200 (2d Cir. 1971) (in banc), cert. denied, 404 U.S. 1049 (1972); Wright v. Newsome, 795 F.2d 964, 968 (11th Cir. 1986) (per curiam); Wolfel v. Bates, 707 F.2d 932, 934 (6th Cir. 1983) (per curiam); see also Losch v. Borough of Parkesburg, 736 F.2d 903, 909 (3d Cir. 1984) (individuals cannot be maliciously prosecuted for criticizing police conduct). Defendants' motion for summary judgment on the basis of qualified immunity will be denied.

CONCLUSION

Defendants' motion for summary judgment on Drexel's claim for retaliatory segregation will be granted as to all defendants except Super. Vaughn. Defendants' motion for summary judgment on Drexel's claim for retaliatory transfer will be granted as to all defendants except Super. Vaughn. Super. Vaughn is not entitled to qualified immunity.

An appropriate Order follows.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

GUY DREXEL : CIVIL ACTION
 :
 v. :
 :
 DONALD T. VAUGHN, et al. : NO. 96-3918

ORDER

AND NOW, this 2d day of April, 1998, upon consideration of defendants' motion for summary judgment, plaintiff Guy Drexel's ("Drexel") response thereto, and in accordance with the attached Memorandum, it is hereby **ORDERED** that defendants' motion is **GRANTED IN PART AND DENIED IN PART** as follows:

1. Defendants' motion for summary judgment on Drexel's claim for retaliatory segregation under 42 U.S.C. § 1983 is:

a. **GRANTED** as to defendants Deputy Superintendent Winder, Dr. Smith, Captain Caison, Captain Terra, Lieutenant Marsh, Lieutenant Barone and Adrian Callender.

b. **DENIED** as to defendant Superintendent Vaughn.

2. Defendants' motion for summary judgment on Drexel's claim for retaliatory transfer under 42 U.S.C. § 1983 is:

a. **GRANTED** as to defendants Deputy Superintendent Winder, Dr. Smith, Captain Caison, Captain Terra, Lieutenant Barone, Lieutenant Marsh and Adrian Callender.

b. **DENIED** as to defendant Superintendent Vaughn.

Norma L. Shapiro, J.